

1 MORRISON & FOERSTER LLP
 Charles S. Barquist (CA SBN 133785)
 2 555 West Fifth Street
 Los Angeles, California 90013-1024
 3 Telephone: 213.892.5200
 Facsimile: 213.892.5454
 4 CBarquist@mofo.com

5 Jacqueline C. Charlesworth (*pro hac vice*)
 Craig B. Whitney (CA SBN 217673)
 6 Kelvin D. Chen (*pro hac vice*)
 1290 Avenue of the Americas
 7 New York, New York 10104
 Telephone: 212.468.8000
 8 Facsimile: 212.468.7900
 JCharlesworth@mofo.com
 9 CWhitney@mofo.com
 KChen@mofo.com

10 Attorneys for Plaintiffs
 11 DON HENLEY and MIKE CAMPBELL

12 TURNER GREEN LLP
 Christopher W. Arledge (CA SBN 200767)
 13 Peter Afrasiabi (CA SBN 193336)
 John Tehranian (CA SBN 211616)
 14 535 Anton Boulevard, Suite 850
 Costa Mesa, California 92626
 15 Telephone: 714.434.8750
 Facsimile: 714.434.8756
 16 CArledge@turnergreen.com
 PAfrasiabi@turnergreen.com
 17 JTehranian@turnergreen.com

18 Attorneys for Defendants
 19 CHARLES S. DEVORE and JUSTIN HART

20 **UNITED STATES DISTRICT COURT**
 21 **CENTRAL DISTRICT OF CALIFORNIA**

22 DON HENLEY and MIKE
 23 CAMPBELL,

24 Plaintiffs,

25 v.

26 CHARLES S. DEVORE and JUSTIN
 27 HART,

28 Defendants.

Case No. SACV09-0481 JVS (RNBx)

Hon. James V. Selna

**JOINT REPORT PURSUANT TO
 FED. R. CIV. P. 26(F)**

SCHEDULING CONFERENCE

DATE: AUGUST 10, 2009

TIME: 10:30 A.M.

LOCATION: COURTROOM 10C

1 Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, Local Rule
2 26-1, and the Court's June 22, 2009 Order Setting Rule 26(f) Scheduling
3 Conference, counsel for Plaintiffs Don Henley and Mike Campbell and Defendants
4 Charles S. DeVore and Justin Hart respectfully submit their Joint Rule 26(f)
5 Conference Report.

6
7 **A. SYNOPSIS:**

8 **1. Plaintiffs' Claims:**

9 Plaintiffs Don Henley and Mike Campbell bring this litigation seeking
10 declaratory, injunctive, and monetary relief relating to Defendants Charles S.
11 DeVore and Justin Hart's unauthorized use of two well-known and valuable songs,
12 "The Boys of Summer" and "All She Wants to Do Is Dance," which are widely
13 associated with Henley.

14 In that regard, DeVore and Hart copied almost all of Henley and Campbell's
15 copyrighted musical composition, "The Boys of Summer," altered the lyrics, and
16 created a video to promote the U.S. Senate campaign of DeVore.

17 Shortly after being informed that Henley objected to their use of "The Boys
18 of Summer," DeVore and Hart appropriated another famous song widely associated
19 with Henley, "All She Wants to Do Is Dance," which they also fashioned into a
20 campaign video.

21 Accordingly, Henley and Campbell bring claims for direct copyright
22 infringement, contributory copyright infringement and vicarious copyright
23 infringement based on Defendants' unauthorized "The Boys of Summer" video. In
24 addition, Henley brings claims for false association or endorsement, pursuant to 15
25 U.S.C. § 1125(a), and unfair business practices, pursuant to California Business &
26 Professions Code § 17200, based on Defendants' unauthorized "The Boys of
27 Summer" video and "All She Wants to Do Is Dance" video.

28

1 **2. Defendants’ Defenses and Counterclaims:**

2 Defendants contend that their videos are parodies and are permissible under
3 the copyright fair use doctrine. In addition, Defendants contend that there is not
4 and never has been any confusion as to Henley’s endorsement of the videos.
5 DeVore and Hart seek declaratory relief to establish their rights to make, use and
6 show the videos. They also assert a claim for damages under 17 U.S.C. § 512(f) for
7 Plaintiffs’ knowing misrepresentation that the parody videos are infringing.

8
9 **B. LEGAL ISSUES:**

10 A primary legal issue is whether DeVore’s and Hart’s use of “The Boys of
11 Summer” infringes Plaintiffs’ copyright because it does not qualify as a fair use.

12 Other legal issues include whether DeVore and Hart violated the Lanham Act
13 and California’s Unfair Competition Law in using “The Boys of Summer” and “All
14 She Wants to Do Is Dance” in their videos.

15 In addition, DeVore and Hart raise the issue whether Henley and Campbell
16 have knowingly misrepresented that DeVore and Hart’s videos are infringing.

17 **C. DAMAGES:**

18 Plaintiffs seek statutory damages in the amount of \$150,000 for Defendant’s
19 willful copyright infringement of Henley and Campbell’s work “The Boys of
20 Summer” or, at Plaintiffs’ election, actual damages and profits, in an amount to be
21 determined through discovery and trial. Plaintiffs also seek DeVore’s and Hart’s
22 profits and damages, in an amount to be determined through discovery and trial, for
23 their violations of the Lanham Act.

24 Plaintiffs also seek an order awarding Henley and Campbell their attorneys’
25 fees, together with the costs and disbursements of this action.
26
27
28

1 DeVore and Hart seek damages in an amount to be proven at trial for
2 Plaintiff's knowing misrepresentation that DeVore and Hart's videos are infringing
3 works.

4
5 **D. INSURANCE:**

6 Plaintiffs are not aware of any insurance that might provide coverage in this
7 dispute.

8 Defendants are not aware of any insurance that might provide coverage in
9 this dispute.

10 **E. MOTIONS:**

11 Other than the summary judgment motions listed below, the parties do not
12 anticipate any pre-trial motions at this time.

13
14 **F. DISCOVERY AND EXPERTS:**

15 **1. Changes in the Disclosures Under Rule 26(a)**

16 The parties do not propose any changes to the disclosures under Rule 26(a).

17
18 **2. The Subjects on Which Discovery May Be Needed**

19 a. At this time, Plaintiffs anticipate that discovery will be needed on at
20 least the following subjects:

21 i. the creation, use and distribution of the Defendants' "Boys of
22 Summer" video and "All She Want To Do Is Dance" video;

23 ii. Defendants' fundraising efforts relating to the videos;

24 iii. Defendants' publicity efforts relating to the videos, including
25 interviews and "blogs" and the solicitation of other videos;

26 iv. information regarding Defendants' and third-parties' Internet
27 websites carrying the videos;

28 v. information regarding viewing of the videos;

- 1 vi. Defendants' views that the use of Henley's and Campbell's
- 2 creative works is a parody or fair use or protected by the First Amendment;
- 3 vii. other alleged parodies created by or on behalf of Defendants;
- 4 viii. Defendants' media strategies in connection with the campaign;
- 5 ix. information related to campaign financing and contributions;
- 6 x. information related to Defendants' profits from Defendants'
- 7 unauthorized behavior alleged in the Complaint;
- 8 xi. information relating to Defendants' ownership and use of
- 9 copyrighted works and other intellectual property,
- 10 xii. information relating to Defendants' licensing efforts for
- 11 intellectual property;
- 12 xiii. Defendants' responses to takedown notices pursuant to the
- 13 Digital Millennium Copyright Act (DMCA) for the songs at issue in this lawsuit
- 14 and any other works;
- 15 xiv. information related to Defendants' interviews and other publicity
- 16 efforts relating to this lawsuit;
- 17 xv. whether Defendants intend to honor the pledge made by the
- 18 Republican National Committee that Republican candidates will not "use any
- 19 musicians' work without proper permission in future campaigns";
- 20 xvi. Damages allegedly suffered by Defendants as a result of the
- 21 takedown notices sent pursuant to the DMCA;
- 22 xvii. the factual basis for Defendants' affirmative defense of fraud on
- 23 the Copyright Office;
- 24 xviii. the factual basis for defendants' affirmative defense that they are
- 25 "innocent infringers";
- 26 xix. the factual basis for Defendants' affirmative defense that "Boys
- 27 of Summer" and "All She Want To Do Is Dance" are in the public domain; and
- 28

1 xx. the factual basis for Defendants' affirmative defense that “Boys of
2 Summer” and “All She Want To Do Is Dance” are not original works of authorship.

3 b. At this time, Defendants anticipate that discovery will be needed on at
4 least the following subjects:

5 i. The economic impact of the parody videos on Plaintiffs;

6 ii. The meaning (both the subjective meaning of the authors and the
7 perceived meaning by the public) of the songs in question;

8 iii. All facts supporting Plaintiffs’ allegations, including the damages
9 allegations;

10 iv. The existence and extent of any public confusion as to Henley’s
11 participation in or endorsement of the videos;

12 v. Plaintiffs’ prior statements about and activities related to politics
13 and issues of public concern;

14 vi. The extent to which the musical tracks used by Defendants can be
15 associated with Henley, including whether the particular style of play is
16 distinctively Henley’s;

17 vii. The extent to which the musical tracks used by Defendants use or
18 consist of distinctive attributes of Don Henley’s;

19 viii. Whether Plaintiffs were aware of the protected nature of
20 Defendants’ videos and have claimed copyright protection for another
21 reason, for example to stifle political ideas with which they disagree;

22 ix. The ownership of the copyrights to the two songs in question, and
23 whether the owners of the songs have licensed them to third parties.

24
25 **3. Discovery Phases and Limitations**

26 The parties agree that discovery should not be conducted in phases or
27 otherwise be limited, within the limitations set forth in the Federal Rules of Civil
28 Procedure.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4. Discovery Conducted to Date

The parties have agreed to exchange documents in connection with their initial disclosures, which will be made on the same date as the filing of this Joint Report.

5. Changes to Limitations on Discovery

The parties agree that there should be no changes to the limitations set forth in the Federal Rules of Civil Procedure relating to discovery. The parties recognize, however, that the convenience of witnesses should be accommodated by counsel for both parties when scheduling non-expert depositions.

6. Other Orders

The parties will submit a stipulated protective order to the Magistrate Judge for his consideration.

7. Number of Depositions

Plaintiffs anticipate that they will conduct between five and eight depositions of fact witnesses.

Defendants anticipate that they will conduct between five and eight depositions of fact witnesses.

8. Proposed Time of Expert Disclosures under F.R.Civ.P. 26(a)(2)

As illustrated in Exhibit A, the parties propose to make their opening expert witness disclosures on January 25, 2010 and rebuttal expert witness disclosures on February 22, 2010.

1 **9. Other Issues Related to Discovery**

2 The parties agree that attorney-client communications with litigation counsel
3 that are created after the filing of the Complaint in this action need not be included
4 in a privilege log.

5 Plaintiffs have proposed and Defendants are considering an agreement that
6 documents and information stored by the producing party in hard copy and
7 electronically stored information should, to the extent that it is technically and/or
8 practically feasible, be produced electronically as follows:

9 (a) Single-page group IV TIFFs in at least 300 dpi (color images to be
10 produced in JPEG);

11 (b) Searchable text files for each document bearing the name of the
12 beginning production number for each document (text of native files to be extracted
13 directly from native files where possible; OCR for paper documents); and

14 (c) Database load files and cross reference files, e.g., Concordance default-
15 delimited file (meta data) and an Opticon-delimited file (image reference files), and
16 including (as available) the following fields: Begno, Endno, Attach Begin, Attach
17 End, Page Count, Sent On, To, From/Author, CC, Bcc, Sent Time, Subject,
18 Custodian, File Name, Document Date (create, modify, last access), File Type.

19 MS Excel, MS Access and comparable spreadsheet and database files shall
20 be produced in native format. The parties acknowledge that the production of
21 certain documents according to this protocol may not be technically and/or
22 practically feasible. Therefore, in such instances, the parties shall meet and confer
23 in good faith regarding production format and the production of documents in light
24 of the above protocol and consistent with the parties' obligations under the Federal
25 Rules of Civil Procedure.

1 **G. DISPOSITIVE MOTIONS:**

2 The parties anticipate filing cross motions for summary judgment on issues
3 of liability, particularly whether DeVore and Hart are entitled to a fair use defense
4 for their use of “The Boys of Summer.”

5
6 **H. SETTLEMENT AND SETTLEMENT MECHANISM:**

7 At this time, the parties have not engaged in formal settlement discussions.
8 The parties, however, through their counsel, have been in communication with each
9 other and are willing to consider reasonable and appropriate offers for settlement.

10 Pursuant to Local Civil Rule 16-15.4, the parties select as their preferred
11 settlement process Settlement Procedure No. 1, appearance before the Magistrate
12 Judge assigned to the case.

13 **I. TRIAL ESTIMATE:**

14 Plaintiffs estimate that five to seven days will be required for trial.

15 Defendants estimate that eight days will be required for trial.

16 The parties agree that trial will be by jury. Each party estimates that it will
17 call approximately six or seven witnesses at trial.
18

19 **J. TIMETABLE:**

20 The parties have completed the Court’s Presumptive Schedule of Pretrial
21 Dates, attached hereto as Exhibit A.
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

N. MAGISTRATES:

The parties do not wish to have a Magistrate Judge preside over the proceedings.

Dated: July 28, 2009

MORRISON & FOERSTER LLP
Charles S. Barquist
Jacqueline C. Charlesworth
Craig B. Whitney
Kelvin D. Chen

By: /s/ Charles S. Barquist
Charles S. Barquist

Attorneys for Plaintiffs
DON HENLEY and MIKE CAMPBELL

Dated: July 28, 2009

TURNER GREEN LLP
Christopher W. Arledge
Peter Afrasiabi
John Tehranian

By: /s/ Christopher W. Arledge
Christopher W. Arledge

Attorneys for Defendants
CHARLES S. DEVORE and JUSTIN
HART